IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 1273 of 1992
with
SPECIAL CRIMINAL APPLICATION No. 1274 of 1992

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

H.T.POWER STRUCTURE P.LTD & 5 - Applicant(s)
Versus
R.P.SHARMA & ANOTHER & 1 - Respondent(s)

==========

Appearance :
MR JP SHAH for Applicant(s) : 1 - 6.
MR MANISH R BHATT for Respondent(s) : 1,
MR BB NAIK for Respondent(s) : 1,
PUBLIC PROSECUTOR for Respondent(s) : 2,

==========

CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 21/09/2007

ORAL JUDGMENT

As common question of law and facts arise in these petitions, they are being disposed of by this

common judgment and order.

2. Special Criminal Application No.1273 of 1992 is filed by the petitioners, - original accused for an appropriate order quashing and setting aside the proceedings launched by the income tax department by way of criminal case No.251/92 pending in the Court of ld. Chief Judicial Magistrate, Ahmedabad and also to quash and set aside the order passed by the ld. Addl. Chief Metropolitan Magistrate dated 27-3-92 in issuing the summons upon the petitioners in the said criminal case.

Special Criminal Application No.1274 of 1992 has been filed by the petitioners, - original accused for an appropriate order quashing and setting aside the proceedings launched by the income tax department by way of criminal case No.252/92 pending in the Court of ld. Chief Judicial Magistrate, Ahmedabad. It is also further prayed to quash and set aside the order of Addl. Chief Metropolitan Magistrate dated 27-3-92 in issuing the summons upon the petitioners in the said criminal case.

3. Criminal case No.252/92 has been filed by the Asst. Commissioner of Income tax, Company Circle 7(2), Ahmedabad against the petitioners, - original accused for the offence punishable u/s 177, 193, 196 and 199 of the IPC r/w section 34, 109 and/or 114 of the IPC for the assessment year 1985-86.

Criminal case No.251/92 is also filed by the very Asst. Commissioner of Income tax against the petitioners, - accused persons for the offence u/s 276(1) and 277 of the Income tax Act, 1961 r/w section 278-B of the IT Act for the assessment year 1985-86.

4. Few facts which are necessary for the determination of the aforesaid two criminal cases as emerges from the record in nutshell are that the petitioner No.1 is a private limited company manufacturing transmission line towers and selling them to electricity board and railways. The petitioner Nos.2 to 6 are the Directors of the said company. On 28-6-84, the petitioner company filed income tax return showing loss of Rs.2,19,169/- inclusive therewith audited profit and loss account and balance sheet for AY 1984-85. The Assessing officer dated 30-3-85 u/s 143(3) of the IT Act, 1961 stating “depreciation of Rs.2,19,169/- and investment allowance of Rs.91,198/- is allowed to be carried forward.” The above assessment order accepting the method of charging the retention money held back by the clients to be debited to P & L was passed on 30-3-85. On 1-5-85, the petitioner company filed written for accounting years 1985-86 showing loss of Rs.13,01,641/- with a similar note like earlier orders in the notes forming part of accounts and debited to P & L account the amount

of retention money. It is the case of the petitioners that by the time, the said assessment was taken up in the next year's account ending on 30-5-85 for AY 1986-87, the petitioner company changed the method of accounting by deciding not to debit the retention money and therefore, during assessment proceedings of AY 1985-86, the petitioner company addressed a letter dated 22-2-98 requesting the AO to add back to income the claim of retention money. The AO passed an assessment order dated 25-3-88 for AY 1985-86 adding back Rs.1,70,360/- as prayed by the petitioner company yet computing the loss of Rs.9,80,398/- and also ordered initiation of penalty u/s 271(1)(c) of the IT Act. The petitioner company went in appeal to CIT(A) against this assessment order for AY 1985-86. The AO passed an order giving effect to the order of CIT(A) revising the total loss to Rs.10,63,045/-. The present applications are against the prosecution of the company and its Directors for concealing the above income by Rs.1,70,360/- for AY 1985-86. It appears that thereafter, the AO issued show cause notice u/s 271(1)(c) of the IT Act dated 6-9-98. The petitioners replied to the same. However, the Income tax Officer by order dated 30-3-89 rejected the above and other contentions and imposed the penalty of Rs.1 lac. The petitioner company went in appeal to CIT(A) against the above penalty order. The CIT(A) dismissed the appeal. The petitioner

company preferred an appeal to the Income tax Appellate Tribunal being ITA No.4778/91. When the aforesaid appeal was pending, the Income tax department instituted a criminal case No.251/92 for the offence u/s 276C(1) and 27 r/w section 278B of the IT Act and criminal case No.252/92 for the offence u/s 177, 193, 196 and 199 r/w section 34, 109 and/or 114 of the IPC. The learned Addl. Chief Metropolitan Magistrate passed an order issuing the summons upon the petitioners and non bailable warrants were also issued against the petitioner Nos.2 to 7 being the Directors of the petitioner company. Being aggrieved by the above two criminal proceedings and the orders passed by the ld. Addl. Chief Metropolitan Magistrate issuing the summons upon the petitioners, the petitioners have preferred the present petitions under Articles 226 and 227 of the Constitution of India.

5. Shri JP Shah, learned senior advocate appearing on behalf of the respective petitioners has submitted that pending the present proceedings before this Court, the Tribunal has already allowed the appeal of the petitioner company by its judgment and order dated 10-2-93 which is reported in 1993(45) ITD 571. Under the circumstances and relying upon the two decisions of the Hon'ble Supreme Court in case of K.C. Builders and another Vs. Asst. Commissioner of

Income tax reported in 2004(265) ITR 562 and in the case of Virtual Soft Systems Ltd. V. Commissioner of Income tax reported in (2007) 289 ITR 83 (SC), it is requested to allow the present applications and to quash and set aside the aforesaid criminal proceedings. The learned advocate appearing on behalf of the respective petitioners has submitted that as observed by the Hon'ble Supreme Court in the case of KC Builders and another (supra), the finding of the Appellate Tribunal is conclusive and prosecution cannot be sustained since the penalty after having been cancelled, no offence survives under the IT Act and thus, quashing of prosecution is automatic. It is further submitted by the Hon'ble Supreme Court that if the Tribunal has set aside the order of concealment and penalties there is no concealment in the eyes of law and, therefore, the prosecution could not be proceeded with by the complainant and further proceedings will be illegal and without jurisdiction. He has also relied upon the further observation of the Hon'ble Supreme Court in the aforesaid decision to the effect that as there was absent of dishonest and fraudulent intention, the question of committing the offence u/s 420 of the IPC does not arise. It is further submitted that as observed by the Hon'ble Supreme Court when the matter has been adjudicated and settled by the Tribunal need not be dragged into

the criminal courts unless and until the act of appellants could have been described as culpable. Under the circumstance and in view of the subsequent development that the order of penalty has been quashed and set aside by the Tribunal, it is requested to allow the present applications and to quash and set aside the criminal complaints as well as the orders passed by the ld. Metropolitan Magistrate in issuing the summons in the said complaint.

6. Shri BB Naik, learned advocate appearing on behalf of the department has not disputed that the order of penalty has been set aside by the Tribunal. He has also not in a position to distinguish the decision of the Hon'ble Supreme Court relied upon by the petitioners. He is also not in a position to dispute that once the order penalty has been set aside by the Tribunal, the prosecution cannot be sustained.

7. Under the circumstances and considering the fact that the Appellate Tribunal has allowed the appeal of the petitioner company and has quashed and set aside the order of penalty, as held by the Hon'ble Supreme Court in the case of KC Builders and another (supra), once the order of penalty has been cancelled by the Tribunal, the finding of the Appellate Tribunal is conclusive and the

prosecution cannot be sustained is to be quashed.

8. For the reasons stated above and considering the judgment of the Hon'ble Supreme Court in the case of KC Builders (supra) and Virtual Soft System Ltd. (supra), the impugned complaint being criminal case Nos.251/92 and 252/92 as well as the order passed by the ld. Addl. Chief Metropolitan Magistrate dated 27-3-92 in issuing the summons upon the petitioners in the said criminal cases are hereby quashed and set aside. Rule made absolute in each of the petition.

(M.R. Shah, J.)

shekhar/-